90-1462

Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

J. A. JONES CONSTRUCTION COMPANY and E. R. MITCHELL CONSTRUCTION COMPANY d/b/a JONES/MITCHELL, a Joint Venture,

Petitioner,

v.

CITY OF ATLANTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

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QUESTIONS PRESENTED

1. Whether a jury's 42 U.S.C. § 1983 damages award for full compensation may be reduced to an amount less than full compensation.

2. Whether the measure of damages for deprivation of procedural due process rights is identical to, and controlled by, the state law measure of damages for deprivation of the underlying property right.

3. Whether the Georgia Supreme Court erroneously interpreted federal law by holding that the jury's award of additional, consequential damages under 42 U.S.C. § 1983 "duplicated" out-of-pocket expenses awarded as state law damages.

PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF GEORGIA

Petitioner[1] and Respondent were the sole parties in the state Supreme Court proceedings.[2] Petitioner J.A. Jones Construction Company is a wholly-owned subsidiary of Jones Group, Inc. In addition, Petitioner owns interests in the following subsidiaries, excluding wholly-owned subsidiaries: J. A. Jones Applied Research Company, Jones Operations & Maintenance Company, Jones Capital Corporation, Queens Properties, Inc., Addition Insurance Agency, Inc., Electrical and Specialty Systems, J. A. Jones of the Bahamas, Inc., Enviro-Tech Abatement Services Company, Norfab, Inc., J. A. Jones De Mexico S. A., Queens Construction Company, Metric Constructors, Inc., Rea Construction Company, LGM, Inc. and Mark III, Inc.

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[1] Although the caption of this case indicates suit by a joint venture, J. A. Jones Construction Company is the sole plaintiff/petitioner. The joint venturer expressly waived any right or interest in the outcome of this litigation.

[2] The Metropolitan Atlanta Rapid Transit Authority ("MARTA") filed a brief of amicus curiae in the Georgia Supreme Court.

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OPINIONS BELOW

The opinion of the Georgia Court of Appeals contains a comprehensive description of the facts underlying this controversy. It is reported as *Atlanta v. J. A. Jones Constr. Co.*, 195 Ga. App. 72, 392 S.E.2d 564 (1990). The Georgia Court of Appeals affirmed a jury verdict for Petitioner in the amount of $522,125.05 in state law damages, plus $375,000.00 in damages under 42 U.S.C. § 1983.

The Georgia Supreme Court addressed only issues of damages. It left intact the jury's and the Georgia Court of Appeals's decisions that the Respondent had

violated both state law and 42 U.S.C. § 1983. However, the Georgia Supreme Court reduced Petitioner's award to a total of just $22,125.05. *Atlanta v. J. A. Jones*, 260 Ga. 658, ___ S.E.2d ___ (1990).

Copies of these decisions appear in the Appendix. The Appendix also includes the Motion for Rehearing in the Georgia Supreme Court, in which Petitioner addressed all issues posed by this Petition; and the denial of rehearing.

STATEMENT OF JURISDICTION

The opinion of the Supreme Court of Georgia was rendered on December 5, 1990. That Court denied rehearing on December 19, 1990. This petition is timely filed within 90 days of denial of rehearing. This Court has certiorari jurisdiction under 28 U.S.C. § 1257(3), in that this controversy involves interpretation and application of a statute of the United States.

FEDERAL STATUTE INVOKED

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Petitioner J.A. Jones Construction Company ("Jones") is a major construction contractor. A sub-

stantial portion of Jones's construction work is performed for public entities. Respondent City of Atlanta ("City" or "Atlanta") is a municipal corporation which owns and operates one of the world's largest and busiest airports.

In 1985, Atlanta advertised for bids on a major expansion of an airport parking deck. Jones submitted the lowest timely bid. A competitor submitted a late bid. Even though the competing bid was late, the City eventually accepted the competitor's bid and rejected that of Jones.[3]

The Atlanta Procurement Code requires an award of a city construction contract to the lowest conforming bidder. Pursuant to procedures specified in that Code, Jones formally and in writing protested the City's acceptance of the untimely bid. Jones filed not one but three such protests. If a hearing had been convened, Jones would have demonstrated (as it did at trial) that it was the lowest conforming bidder and thus entitled to the contract as a matter of law.

However, Jones's protests were ignored. Jones was afforded no process whatsoever. Jones discovered the final award of the contract to its competitor only when one of its employees noticed the commencement of work on the parking deck expansion.

Jones sued the City in state court, alleging violation of both state law and Jones's constitutional rights to

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[3] Contract costs totaled approximately $13,000,000.00 The competitor's bid was lower than Jones's bid by about $10,500—less than one-tenth of one percent of the total. In rejecting Jones's bid, the City's mayor acted in part under the mistaken impressions that the difference in bids was in the neighborhood of $150,000, and that this was a smaller project. 195 Ga. App. at 74.

due process under the Fourteenth Amendment. At trial the court directed a verdict of liability on Jones's constitutional claim,[4] and submitted the state law issues, and all damages issues, to the jury.

The City contested the federal damages requested by Jones, but did so in an oblique way. The City argued that the damages requested on the constitutional claim were "duplicative" of the damages sought on the state law claim. The trial court avoided duplication, however, by charging explicitly that the jury must not award the same damages on both counts. It further insured against "double damages" by instructing the jury that profits lost by Jones on this contract were awardable on the state law count and not also on the federal law count. Finally, the trial court used a special verdict form, forcing the jury to allocate damages by claim.

The jury found the City liable as a matter of state law. It then awarded separate damages on the state law and federal law claims. It returned a verdict for $522,125.05 on the state law claim. This was the amount proved by Jones as its "fee" lost from inability to perform the contract, plus its bid preparation costs. In addition, the jury awarded $375,000.00 for the City's denial of Jones's federal constitutional rights. This award was supported by record testimony

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[4] The City appealed from this result only as far as the Georgia Court of Appeals. A unanimous panel of that court affirmed the City's liability for failure to provide constitutionally required due process. Jones's property right to the award of the contract was clearly established under Georgia law, *Hilton Constr. Co. v. Rockdale Cty. Bd. of Ed.*, 245 Ga. 533, 266 S.E.2d 157 (1980), and reaffirmed by both the Court of Appeals and Georgia Supreme Court in this case.

that Jones also lost profits from so-called "add-ons" (additional work undertaken in the normal course by the awardee of the original contract); and that, as a direct result of the loss of this contract, Jones had to lay off employees and was less prepared to bid for and work on subsequent contracts. 195 Ga. App. at 74.

The Georgia Court of Appeals affirmed the jury verdict in every respect, including a finding that the jury's award of civil rights damages did not duplicate the state law damages verdict. 195 Ga.App. at 75. The City petitioned for and was granted certiorari by the Georgia Supreme Court.

The state Supreme Court did not disturb the directed verdict that the City had violated 42 U.S.C. § 1983, nor the jury verdict that the City violated state law. However, that Court reversed the damage award on both parts of the verdict. It first limited state law recovery to bid preparation costs, pursuant to newly announced policy. It then stripped away any recovery whatsoever under federal law, as "duplicative" of state law bid preparation damages. The result left Jones with not the jury's award of $897,125.05 in proven damages, but only $22,125.05, as Jones's total judgment on both counts combined. The court's entire pertinent discussion is as follows:

> Appellant complains that the award based on the § 1983 claim constituted an impermissible double recovery. We agree.
>
> > [T]he abstract value of a constitutional right may not form the basis of § 1983 damages. . . . [S]uch damages must always be designed 'to *compensate injuries* caused by the constitu-

> tional deprivation.' [Cits.]. [*Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308-9 (106 SC 2537, 91 L.Ed.2d 249 (1986)]
>
> The basis for appellees' § 1983 claim was that appellant failed to afford them a hearing at which they could contest the award of the contract to another bidder. The damage from that failure was that appellees were not themselves awarded the contract. As we have held above, the permissible recovery for that wrong is the reasonable expense of bid preparation. Accordingly, we hold that the award for damages on the § 1983 claim must also be reversed.

260 Ga. at 659 (Appendix at 3a).

This language decides three issues. Most obviously, it rejects damages under section 1983 as duplicative of the state law recovery. It also decides that, as a matter of law, recovery under federal law for denial of due process rights may not exceed state law damages for deprivation of the underlying property or liberty. Finally, it decides that constitutional law damages, which expressly are designed to afford "compensation," nevertheless can be limited by state law to *less* than full compensation—in this case, just out-of-pocket expenses.[5]

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[5] Remarkably, the Georgia Supreme Court reached out to decide the measure of federal damages under the guise of "duplication," even though the Georgia Court of Appeals had already held that the City waived the measure of damages issue. The Court of Appeals held that the issue of damage measurement was not included in the separate issue whether federal damages duplicated those available under Georgia law. It likened the City's approach to preservation of error as "a process of switching,

All of these issues have been contested in the state courts. In particular, see Jones' Petition for Rehearing in the Georgia Supreme Court (in Appendix to this Petition).

REASONS FOR GRANTING THE WRIT

An extraordinary range of reasons supports discretionary review of this case. Important issues of both statutory interpretation and choice of law demand resolution for the guidance of the lower courts. The Georgia Supreme Court's ruling conflicts unmistakably with principles announced by this Court and by the lower courts. Summary disposition is needed to signal the need for care and correctness in the state courts' exercise of concurrent jurisdiction over federal civil rights claims.

I. THE MEASURE OF "COMPENSATION," AND CHOICE OF LAW GOVERNING DAMAGES, ARE BOTH SIGNIFICANT ISSUES WORTHY OF CERTIORARI.

A. The Measure of Damages Ruling Warrants Review.

This case poses the substantial issue whether "compensation" can ever mean less than full compensation. "[T]he central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors." *Felder v. Casey*, 487 U.S. 131, 141 (1988). Hence, the measure of damages for denial of constitutional rights, including procedural due process rights, is compensation. *Memphis Sch. Dist. v. Stachura*, 477 U.S. 299, 307-10 (1986); *Carey v. Piphus*, 435 U.S. 247, 254 (1978).

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shifting and mending one's hold." 195 Ga.App. at 75. The Supreme Court did not reverse nor even discuss this waiver ruling.

Compensation means more than recovery of out-of-pocket expenses, when additional losses are proven. *Stachura*, 477 U.S. at 307. For example, lost profits awards compensate loss of opportunity to earn profits. *E.g., Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209 (1959) (antitrust). In the present case, failure to afford due process denied Jones the opportunity to earn its profits, and caused other proven losses.[6]

The Georgia Supreme Court specifically disallowed recovery of lost profits. It did so even though lost profits are recoverable compensation under Georgia law, just as under federal law. Specifically, awards of lost profits compensate public contractors whose performance is prevented by contracting municipalities. *Decatur Cty. v. Praytor & Co.*, 163 Ga. 929, 127 S.E.2d 247 (1927); *DeKalb Cty. v. Beacon Inds., Inc.*, 187 Ga.App. 370, 370 S.E.2d 191 (1988), *cert. denied*, 187 Ga.App. 907. In this case, the Georgia Supreme Court ignored *Decatur County* and *DeKalb County* and denied compensation for loss of profits *as a matter of state law damages*:

> To permit the recovery of lost profits would unduly punish the tax-paying public while compensating the plaintiffs for effort they did not make and risks they did not take. Limiting recovery to reasonable bid preparation costs is in keeping with the legitimate governmental objective of rewarding the lowest qualified bidder and guarding

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[6] Thus, the jury's award was not based upon "the abstract value of a constitutional right," as the Georgia Supreme Court may have hinted in its unexplained quotation from *Stachura*, but rather upon actual injury suffered and proven.

> against public officials shirking their duties while, at the same time, preventing unwarranted waste of taxpayers' money.

260 Ga. at 659 (Appendix at 2a-3a).

Consistent with the federal compensation principle, however, this Court has impliedly authorized redressing victims for effort they did not make, and risks they did not take, where unlawful government action deprived them of the opportunity to earn. In *Stachura* neither the parties nor this Court questioned the proposition that compensation includes both past and future lost earnings attributable to governmental wrongdoing. 477 U.S. at 302, 309 n.13.

The Georgia Supreme Court has the authority to decide, as a matter of Georgia public policy, to deny lost profits and thereby to award less than full compensation *as Georgia law damages*. The Georgia Supreme Court erred, however, by allowing its newly announced public policy to usurp the Congressional remedies protecting due process rights. *Felder v. Casey*, 487 U.S. at 149.

"[T]he interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts." *Carey v. Piphus*, 435 U.S. 247, 258 (1978). The right to procedural due process is effectuated by compensating victims for resulting losses. *Id.* The Georgia Supreme Court erroneously limited relief to less than compensation, namely the "out-of-pocket loss" of bid preparation costs.

Compensatory remedies assure that government will treat every citizen with procedural dignity. Fully compensatory awards are important to guarantee deter-

rence, in part because supercompensatory and punitive damages are not permitted. *Stachura*, 477 U.S. at 309-10. If the public policy behind the United States Constitution is now to be changed, so that citizens may be deprived both of due process *and* of full compensation as redress, that decision should come from this Court, and not from any state court.

B. The Choice of Law Ruling Warrants Review.

The decision of the Georgia Supreme Court indicates fundamental change in the law of *choice* of law as well. 42 U.S.C. § 1983 requires the courts to look first to federal law in filling remedial gaps. State law is not to be adopted where "inconsistent with the Constitution and laws of the United States." *Burnett v. Grattan*, 468 U.S. 42, 47 (1984). Inconsistency is determined by looking to the purposes of the civil rights laws. *Robertson v. Wegmann*, 436 U.S. 584 (1978). State courts are bound to disregard state remedial rules inconsistent with these federal purposes. *Felder v. Casey, supra.*

Until the decision by the Georgia Supreme Court in this case, the federal compensatory purpose was the sole touchstone for determining measure of damages:

> Compensatory damages for deprivation of a federal right are governed by federal standards . . . .
>
> * * *
>
> This means, as we read [42 U.S.C.] § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes.

Sullivan v. Little Hunting Pk., 396 U.S. 229, 239-40 (1969). Thus compensation is the central purpose of civil rights damages, and compensation defines the measure of those damages. Courts are to resort to state law only if state law somehow provides better compensation than federal law.

The Georgia Supreme Court followed the precise opposite approach: it resorted to a newly created state rule to reduce (in fact, to eliminate) compensation for the City's due process violation. Yet "however understandable or laudable the State's interest in controlling liability expenses might otherwise be, it is patently incompatible with the compensatory goals of the federal legislation." *Felder v. Casey*, 487 U.S. at 143. Any change in choice of law rules, especially where the effect is to reduce an award below fully compensatory levels, should come only from this Court.

II. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH DECISIONS OF THE FEDERAL COURTS OF APPEALS, AND COURTS OF LAST RESORT IN OTHER STATES.

The Georgia Supreme Court's decision conflicts in principle with decisions by the United States Courts of Appeals. In one such opinion, the Eleventh Circuit has gone beyond *Sullivan* and held that section 1983 damages are *always* measured according to federal rather than state law. *Murphy v. Flagler Beach*, 846 F.2d 1306, 1308 (11th Cir. 1988).[7]

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[7] *See also Crump v. Board of Ed.*, 326 N.C. 603, 392 S.E.2d 579 (N.C. 1990) (procedural due process damages measured independently of state law property right).

One federal decision involved this very defendant. *Gilmere v. Atlanta*, 864 F.2d 734 (11th Cir.), *cert. denied*, ___ U.S. ___, 107 L.Ed.2d 37 (1989). In *Gilmere*, the City sought refuge behind the federal principle of compensation under section 1983, arguing against a more expansive measure of damages under state law. The *Gilmere* court started from the following principles:

> The Supreme Court has stated that § 1983 remedies are "supplementary to any remedies any State might have," and "have no precise counterpart in State law." The Court added that "it is 'the purest coincidence' . . . when state statutes or the common law provide for equivalent remedies." Thus, there is no requirement that a state remedy be employed to compensate for a violation of a federal interest. In fact, the Court has noted that under [42 U.S.C.] § 1988, "resort to State law . . . should not be undertaken before principles of federal law are exhausted."

864 F.2d at 739 (citations omitted). *Gilmere* rejected a Georgia damages rule found inconsistent with the federal purpose of compensation.[8]

Wright v. Sheppard, 919 F.2d 665 (11th Cir. 1990), also clashes with the decision by the Georgia Supreme Court, on facts even closer to those of this case. *Wright* reversed and remanded a constitutional tort award which was limited to out-of-pocket expenses. Lost wages were held a permissible additional cate-

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[8] *Gilmere* rejected the state law wrongful death measure of damages for death of a man at the hands of city policemen. That measure "would overcompensate [the victim's] next of kin because none were dependent." 864 F.2d at 738, and n.3.

gory of recovery—even though such an award would "compensat[e] . . . for effort [Wright] did not make and risks [he] did not take," to use the language of the Georgia Supreme Court.

Still closer to the facts in this case is *Watseka v. Illinois Pub. Act. Coun.*, 796 F.2d 1547 (7th Cir. 1986), *aff'd*, 479 U.S. 1048 (1987). The defendant city in *Watseka* was found liable for infringing on the plaintiff organization's first amendment free speech rights. The plaintiff was permitted to recover consequential damages, including amounts it lost from its "inability to canvass" for funds. *Id.* at 1559. The *Watseka* recovery is conceptually indistinguishable from the damages awarded to Jones by the jury but taken away by the Georgia Supreme Court.

Still other federal courts of appeals have treated lost profits as recoverable damages for constitutional injury. *Flores v. Pierce*, 617 F.2d 1386 (9th Cir. 1980), *cert. denied*, 449 U.S. 875 (1981); *cf. Cordero Dev't Corp. v. Santiago Vasquez*, 539 F.2d 256 (1st Cir.), *cert. denied*, 429 U.S. 978 (1976) (business lost profits denied only for lack of proof).

Finally, the Georgia Supreme Court's result conflicts directly with dicta from the Supreme Court of Louisiana. In *Haughton Elev. Div. v. State*, 367 So.2d 1161 (La. 1979), the plaintiff was denied procedural due process, and thereby denied its rightful public contract. The plaintiff had sought only injunctive relief. The court noted the possibility of amendment after remand to claim damages including lost profits—against the defendant governmental body, just as against any private person who wrongfully denies the opportunity to earn profits. *Id.* at 1169, n.8.

These lower court decisions reaffirm or establish that: (1) compensation is the measure of constitutional damages; (2) federal law controls the measure of compensation; (3) state law must yield where it conflicts with the compensation measure; (4) compensation is not limited to out-of-pocket expenses; and (5) constitutional compensation includes recovery from public defendants for "effort not made and risks not taken," where the constitutional violation has prevented opportunity to earn and to run risks. All of these principles conflict with the opinion of the Georgia Supreme Court in this case. A litigant should not be subjected to different justice in different courthouses on the same federal civil rights claim. *Felder v. Casey*, 487 U.S. at 157. These conflicts warrant this Court's grant of certiorari.

III. THIS COURT SHOULD REVERSE SUMMARILY FOR CLEAR ERROR, TO PRESERVE THE STATE COURT AS A FORUM FOR CIVIL RIGHTS CLAIMS.

The Georgia Supreme Court committed clear error by concluding that constitutional damages would duplicate state law damages. Correction of such errors is crucial to preserve state courts as an optional forum for federal civil rights actions.

The damages Jones sought under section 1983 cannot be duplicative, now that the Georgia Supreme Court has decided that state law damages are limited to out-of-pocket expenses. The Georgia Supreme Court erroneously disregarded the jury's finding of additional consequential damages totaling $875,000,000. To hold that the state law damages of only $22,125.05

duplicate the additional damages proven in this case was clear error.[9]

The Georgia Supreme Court ignored the federal test for determining double damages. The federal law test, for section 1983 cases and for others, is as follows:

> [A]n injured party may recover damages only for the actual loss he suffered and not more; he is *entitled to be made whole*, but not entitled to be put in a better condition than he would be in had the wrong not been committed.

Stringer v. Dilger, 313 F.2d 536, 541 (10th Cir. 1963) (emphasis supplied). Consistent with the rule forbidding duplication of damages, plaintiffs are entitled to one full recovery for all of their injuries. Fully compensatory damages under federal law by definition do not and cannot duplicate state law damages providing less than full compensation. *Clappier v. Flynn*, 605 F.2d 519, 530 (10th Cir. 1979) (federal rule did not permit reduction of damages for comparative fault). Jones is entitled to the jury's compensation for lost profits and other injuries, which are in no way compensated by mere reimbursement for bid preparation costs. *See Lenard v. Argento*, 699 F.2d 874, 891-92 (7th Cir. 1983); and *Stringer, supra* (damages not duplicative to extent multiple awards compensate for different injuries).

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[9] Remand will require the trial court to reallocate damages. The trial court instructed the jury artificially that any verdict for Jones's lost "fee" should be rendered on the state law claim, as opposed to the section 1983 claim, to avoid "double damages." Now that such state law damages have been found impermissible, reallocation is necessary.

Errors of this magnitude should be corrected by this Court, and corrected in no uncertain terms. This Court has encouraged the filing and pursuit of federal civil rights claims in the courts of the various states. But litigants will not utilize that option if the state courts undercut federal remedial protections. To preserve the integrity of the process, and to guarantee litigants a fair shake in the state courts, this Court should exercise its discretionary jurisdiction to correct—and correct quickly—a state court's clear error in a section 1983 case.

CONCLUSION

The issues posed here merit this Court's attention. The decision by the Georgia Supreme Court is inconsistent in principle with decisions of this Court and the lower courts. Jones's federal law damages claim in no way duplicated the state law award. The Georgia Supreme Court erroneously relied upon state law to measure section 1983 damages, and to award less than full compensation. Compensation includes all damages awarded by the jury.

This 19th day of March, 1991.

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SUPREME COURT
STATE OF GEORGIA

No. S90G0957

CITY OF ATLANTA

v.

J. A. JONES CONSTRUCTION COMPANY *et al.*

DECIDED DECEMBER 5, 1990—
RECONSIDERATION DENIED DECEMBER 19, 1990.

BENHAM, Justice.

We granted certiorari to consider the measure of damages to which a "frustrated bidder" is entitled when a governmental agency has wrongfully denied its bid. To consider that issue, only a brief recitation of the facts is necessary. For a more complete statement of the facts, see *City of Atlanta v. J. A. Jones Constr. Co.*, 195 Ga. App. 72 (392 SE2d 564) (1990).

Appellant advertised for bids for construction of a parking deck at Hartsfield International Airport. The deadline for submitting bids was set at 2:00 p.m., April 10, 1985. Appellees' bid was the lowest timely bid submitted, but the contract was awarded to Interstate Construction, whose bid was lower but was submitted three minutes after the 2:00 p.m. deadline. Appellees sued the City in two counts, seeking their lost profits in a claim for damages under state law, and seeking further damages under

42 USC § 1983 for an alleged denial of due process of law in the City's failure to conduct a hearing to consider appellees' complaints regarding the consideration of the late bid. The jury awarded appellees $522,125.05 on their state law claim and $375,000 on the § 1983 claim. The Court of Appeals affirmed the trial court's judgment.

1. In order to determine whether the damages awarded were correct, we must first look at the purpose of the bid requirement. It appears that, all things being equal, the bid process for public projects was designed to protect the public coffers from waste and to assure that taxpayers receive quality work and goods for the lowest possible price. Approval of a process which favors the acceptance of the lowest bid is a constant theme expressed in cases decided by this court, culminating in *Ga. Branch, etc. v. City of Atlanta*, 253 Ga. 397 (321 SE2d 325) (1984). When, as here, a governmental entity has frustrated the bid process and awarded the contract to an unqualified bidder, the injured low bidder may bring an action for appropriate relief. *Hilton Constr. Co. v. Rockdale County Bd. &c.*, 245 Ga. 533 (266 SE2d 157) (1980). However, a low bidder whose bid is unfairly rejected is only entitled to an award of reasonable costs of bid preparation. McQuillian, Municipal Corporations, p. 549, Sec. 29.86. We do not reach the issue of whether a public official could be held personally liable in the event of fraud, collusion, or corruption since that was not an issue in this case. In holding that appellees are entitled only to reasonable costs of bid preparation, which was established at trial to be $22,125.05, we adopt the reasoning of *S & W Mechanical Co. v. City of Homerville*, 682 FSupp. 546 (M.D. Ga. 1988), and specifically disallow the recovery of lost profits. To permit the recovery of lost profits would unduly punish the tax-paying public while compensating the plaintiffs for effort they did not make and risks they did not take. Limiting recovery to reasonable bid preparation costs is in keeping with the legitimate governmental objective of rewarding the lowest

qualified bidder and guarding against public officials shirking their duties while, at the same time, preventing unwarranted waste of tax-payers' money.

Since the award of damages on the state law claim in this case was greatly in excess of the allowable damages, the damages award in the judgment must be reversed.

2. Appellant complains that the award based on the § 1983 claim constituted an impermissible double recovery. We agree.

> "[T]he abstract value of a constitutional right may not form the basis of § 1983 damages. . . . [S]uch damages must always be designed 'to *compensate injuries* caused by the constitutional deprivation.' [Cits.]" [*Memphis Community School Dist. v. Stachura*, 477 U. S. 299, 308-9 (106 SC 2537, 91 LE2d 249) (1986).]

The basis for appellees' § 1983 claim was that appellant failed to afford them a hearing at which they could contest the award of the contract to another bidder. The damage from that failure was that appellees were not themselves awarded the contract. As we have held above, the permissible recovery for that wrong is the reasonable expense of bid preparation. Accordingly, we hold that the award for damages on the § 1983 claim must also be reversed. There being no contest regarding the amount of appellees' bid preparation expenses, the trial court is directed upon remand to enter judgment for appellees in the amount of $22,125.05 with interest.

Judgment reversed and remanded with direction. All the Justices concur, except Smith, P. J., and Fletcher, J., who dissent.

WELTNER, Justice, concurring.

I agree with the opinion. As we have noted, no equitable claim is included in the relief sought by Jones. Nor is

there any claim that seeks money damages against an individual. Because we have eliminated by our holdings some of the relief awarded in the trial court, I write to suggest the possibilities of additional relief (which is *not* here in issue), as might avail for a proper case in the future.

1. Recently we reiterated the long-standing distinction, in cases of official immunity, between ministerial and discretionary functions as to *negligent* acts of public officials.

> Under this court's decisions in *Martin* [*v. Ga. Dept. of Public Safety*, 257 Ga. 300 (357 SE2d 569) (1987), cert. denied 484 U. S. 998 (1988)] and *Price* [*v. Dept. of Transp.*, 257 Ga. 535 (361 SE2d 146) (1987)] . . . where there is a formal self-insurance plan or a policy covering official acts of a public official, sovereign immunity is waived. However, where there is no self-insurance fund, the distinction between ministerial and discretionary acts is still viable in ruling on immunity for public officials for liability for their negligent acts. [*Logue v. Wright*, 260 Ga. 206 (392 SE2d 235) (1990).]

More important to the present discussion, however, is this observation:

> It is important to keep in mind that the immunity is for negligent acts, not for malicious acts, acts of corruption, wilful acts, or acts involving reckless disregard for the safety of others. [Id. at 206-7.]

2. Just as we have held that fraud and corruption may be grounds for invalidating legislative acts,[1] and that ultra

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[1] E.g., *Cross v. Hall County*, 238 Ga. 709, 711 (235 SE2d 379) (1977):

> Where neighbors of rezoned property challenge the rezoning in court on its merits, it will be set aside only if fraud or

vires acts of public officers are not binding upon a public agency,[2] so it would seem, in a proper case, that fraud and corruption on the part of a public official resulting in the unlawful award of a publicly-bid contract may subject the fraudulent and corrupt official to personal liability to the same degree as the public agency.

3. That result follows upon a consideration of these two basic precepts of the law:

(a) "Public officers are the trustees and servants of the people and are at all times amenable to them." Art. I, Sec. II, Par. I, Constitution of Georgia of 1983.

(b) "For every right there shall be a remedy. . . ." OCGA § 9-2-3.[3]

I am authorized to state that Chief Justice Clark, Justice Bell and Justice Hunt join in this concurrence.

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corruption is shown or the rezoning power is being manifestly abused to the oppression of the neighbors. [Id. at 711.]

[2] E.g., *Earth Management, Inc. v. Heard County*, 248 Ga. 442, 448 (283 SE2d 455) (1981):

> We can only conclude that Heard County instituted the condemnation proceeding for the obvious purpose of preventing the land from being used as a hazardous waste facility. Such action is beyond the power conferred upon the county by law and amounts to bad faith. [Id. at 448.]

[3] For a legislative provision imposing personal liability upon public officials for certain contract bidding irregularities, see OCGA § 50-5-79. See also *Cobb County v. Wilson*, 259 Ga. 685 (386 SE2d 128) (1989), concerning equitable relief:

> [I]f the zoning authority refuses to comply with [the trial court's] order to rezone, then the court has the power to punish the members of the zoning authority, in their individual capacities, for criminal contempt. Thus each member as an individual can be fined and/or jailed for contempt. [Id. at 686.]

SMITH, Presiding Justice, dissenting.

This situation would be ludicrous if it was not so serious. Quoting from the appellants' brief, appellee "overlooks the very nature of this case which, at bottom, is another 'disappointed bidder' or 'frustrated bidder' claim."

The undisputed facts are:

(a) Appellees filed their bid properly and before the filing deadline.

(b) Interstate Construction Company filed its bid after the filing deadline.[4]

(c) Palote Construction Company filed it's bid after the filing deadline, but before any bids were opened; it was rejected without being opened.

(d) The City bid officer declared the 2 o'clock deadline had arrived and stated he would not accept any more bids.

(e) Despite this, the same officer stamped the bid of Interstate Construction Company, showing it was received after the 2 o'clock deadline.

(f) The same officer stated that the Interstate bid was late and would not be opened.

(g) Despite the announcement set out in (f) above, Interstate's untimely bid was opened and read along with the bids submitted on time.

(h) The bid officer, his supervisor (the head of the Bureau of Purchasing), and his supervisor's supervisor (the Commissioner of Administrative Services), all took the position that Interstate's bid should be rejected as untimely.

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[4] According to newspaper reports, a principal owner of Interstate Construction Company is Mr. Herman Russell, a heavy contributor to Andrew Young's campaigns for Mayor of Atlanta and Governor of Georgia.

(i) At that time, Mayor Young overruled all of them and ordered the contract be awarded to Interstate although it was filed after the deadline had passed for filing bids.[5]

Appellee is not a "disappointed" or "frustrated" bidder, it is a deprived bidder—deprived by direction of the former Mayor of the City of Atlanta. The majority opinion states at p. 659 that: "We do not reach the issue of whether a public official could be held personally liable in the event of fraud, collusion, or corruption since that was not an issue in this case." That issue should have been addressed.[6]

I ask you, what do you call it when the Mayor, over the objection of the legally constituted body for passing on city bids, directs that a contract be awarded to one whose bid was not filed on time? There is no effort by the majority opinion to exonerate or justify this illegal act.

The only thing the majority does is to try and explain that the bid requirement is for the purpose of protecting the taxpayers.[7] The time deadline is to protect the tax-

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[5] As I sit here in the den of my home preparing this dissent, I see in the newspaper that the Chairman of the Fulton County Commission has "one-upped" the former Mayor of the City of Atlanta. He has awarded a county contract to the *highest* bidder, who, coincidentally contributed $10,000 to the chairman's political campaign. To his credit, however, the bid was apparently filed on time.

[6] Black's Law Dictionary (5th ed.), defines *corruption* thusly:

> An act done with an intent to give some advantage *inconsistent with official duty* and the *rights of others*. The act of an *official* or fiduciary person who unlawfully and *wrongfully* uses his station or character to procure same *benefit* for himself or *for another person* contrary to *duty* and the *rights of others*.

(Emphases supplied.) That is this case, by the definition of corruption.

[7] The Mayor, by awarding the bid to the late, low bidder, still cost the taxpayers money. Although the wrongful bid award was $10,542 less than the low legal bid, the majority awards to the appellee $22,125.05 for the cost of preparing its plans. Thus, even when de-

payers also. Up until now it meant if you do not get your bid in on time, you do not get the bid—period, end of paragraph.

So now that we have allowed a contract beyond the deadline, what deadline do we set past the deadline when one may file his bid? There is a timeworn, but never the less true, expression that illustrates the case at hand. You cannot be a little pregnant. Either you are or you are not. Either you file on time or you do not. A knowing violation of the time limit by one not authorized to award bids cannot be excused by pointing a finger and saying, naughty, do not do that. Nevertheless, the majority says it must protect the taxpayers by striking this large verdict.

There are two remedies applicable to this situation: equitable relief in the form of an injunction, or money damages. As to the first, the appellees' attorney made the statement in his argument that they were requested not to pursue an injunction because it would delay the construction of the parking decks at the airport.[8] Obviously such a delay would cost the taxpayers money. The appellants should not be allowed to take advantage of that courtesy in this law suit. They should be estopped from doing so.

Thus, the only way for the appellees to stop public officials from violating the law is to let courts and juries pass upon their wrongdoing such as we have here and, if

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ducting the lesser amount of the late, low bid from the $22,125.05 awarded to the appellee, the taxpayers must still pay an additional $11,583.05 plus the expense of defending this action. I do not imply that the appellee should not receive the costs of preparing its plans; I only seek to show that the taxpayers are not served well by the majority's results.

[8] This statement was made during oral argument and was not challenged by appellant on rebuttal argument. However, in a supplemental brief after argument, appellant states that the record had been searched and nothing was found. This is entirely reasonable as there was no reason to raise it at trial.

the damages awarded are high, the voters have a way to handle that—the ballot box.

In closing, I think it well to point out that appellant's brief relied upon *Memphis Community School District v. Stachura*, 477 U. S. 299 (106 SC 2537, 91 LE2d 249) (1986) for the proposition that the appellee could only recover nominal damages, "*unless it could show that it had been wrongfully denied the contract on which it bid.*" (Emphasis supplied.) This statement is made despite the fact that the trial court, the jury, the Court of Appeals, and the majority opinion found that appellee had been wrongfully (unfairly is the way the majority opinion put it) denied the contract.

Let us see what The American Heritage Dictionary of the English Language has to say about the word "wrongfully" as quoted in appellant's brief and the word "unfairly" as used in the majority opinion.

Wrongfully: Wrong, Injurious; Unjust. Contrary to law; Unlawful; Illegal.

Unfairly: Not just or evenhanded; Biased; Contrary to laws or convention, especially in commerce; Unethical.

Unjust: (Not just) violating principles of justice or fairness; (unfairly). Wrongful; (as in *Memphis Community School District*, cited by appellant as authority for the proposition that the appellee could recover only nominal damages unless it had been *wrongfully* denied the contract).

Now the two interlocking words in the definitions of *unfairly* and *wrongfully*, the two words used by appellant and the majority opinion, are *not just* in unfairly, and *unjust* in *wrongfully*. Also the last word in the definition of *unjust* is *unfair*. Therefore, you can take these two words by the majority opinion and the appellant and without a shadow of a doubt uphold the verdict and judgment in this case.

FLETCHER, Justice, dissenting.

"Statutes requiring the letting of contracts to the lowest bidder are designed for the benefit and protection of the public, and not that of the bidders." *Peeples v. Byrd*, 98 Ga. 688, 692 (3) (25 SE 677) (1896). Consequently, in resolving the issues presented in a case such as this, the lodestar is the interest of the public and not that of an aggrieved, unsuccessful bidder.

The letting of public works contracts through a competitive bidding process has essentially two objectives: First, it is intended to ensure that public works projects will be constructed by a qualified or responsible bidder at the lowest possible price, see *Ga. Branch &c. Contractors v. City of Atlanta*, 253 Ga. 397 399 (2) (321 SE2d 325) (1984); and, second, it is intended to ensure that government agencies and contractors do not engage in fraud, collusion, or corruption in the letting of public contracts. See *Garrison v. Perkins*, 137 Ga. 744, 756-757 (74 SE 541) (1912).

Consequently, Georgia cases have held that after a government agency has solicited competitive bids for a public works project, it cannot make material changes in the plans and specifications without renewed notice to prospective bidders. *Glynn County v. Teal*, 256 Ga. 174 (345 SE2d 347) (1986); *Manly Building Co. v. Newton*, 114 Ga. 245 (3) (40 SE 274) (1901). Georgia cases have also held that the government agency is vested with discretion in determining whether the lowest bidder is qualified or responsible. *Peeples v. Byrd*, 98 Ga. at 693 (3), supra. It has also been held that the government agency is not authorized to reject the lowest bid without making this determination. *Hilton Constr. Co. v. Rockdale County Bd. &c.*, 245 Ga. 533, 537 (1) (266 SE2d 157) (1980). These holdings serve to ensure that when public works contracts are let, the public interest, in both the competitive bidding process and the awarding of an individual contract, will be served.

Just as is found in most local government invitations to bid, here the city reserved the right to (1) waive informalities in bids, (2) accept any bid submitted, and (3) reject any or all bids. Although Georgia courts have not addressed questions in regard to whether a government agency is authorized to waive an irregularity in the bidding process, courts in other states have addressed such questions.

Consistent with the public interest being the overriding concern in cases such as this, courts in other states have held that where the lowest qualified bidder has failed to submit its bid in strict compliance with the time limits within which such bids are required to be submitted, the government agency, acting honestly and in good faith, may, in exercise of its discretion, waive this irregularity, at least where the untimely bidder has not been given a substantial advantage or benefit not enjoyed by other bidders. See *Gostovich v. City of West Richland*, 452 P2d 737, 740 (3) (Wash. 1969); *Townsend v. McCall*, 80 S2d 262 (10) (Ala. 1955); *Hewitt Contracting Co. v. Melbourne Regional Airport Auth.*, 528 S2d 122 (Fla. App. 1988); *William Young &c. Co. v. West Orange Redevelopment Agency*, 311 A2d 390 (3) (N.J. App. 1973).

Where, as here, the breach of the time requirement was clearly de minimis, and there is no evidence that the lowest qualified (albeit untimely) bidder was thereby given a benefit or advantage, the law in this area thus allows the government agency to exercise its discretion and award the contract to the lowest bidder. This holding serves the public interest. A contrary holding does not.

While I do not agree with the majority's holding that the appellee's bid was unfairly rejected, I am of the opinion that the measure of damages in an action against a governmental body in any case involving the issue of improper rejection of a bid should be limited to the reasonable costs of bid preparation. To hold otherwise would punish the

public, not the offender. If public officials are guilty of fraud, collusion, or corruption in the bidding process, let them be prosecuted and punished through our criminal justice system.

I respectfully dissent.

COURT OF APPEALS
STATE OF GEORGIA

No. A89A1725

CITY OF ATLANTA

v.

J. A. JONES CONSTRUCTION COMPANY

DECIDED MARCH 13, 1990—
REHEARING DENIED MARCH 26, 1990.

BIRDSONG, Judge.

The City of Atlanta (the City) appeals from a judgment, based upon a jury verdict awarding damages to the J. A. Jones Construction Company (Jones). Jones alleged the City improperly awarded the contract to build new parking decks at the Atlanta Airport to a company which submitted a late bid (Count I), and that the City deprived Jones of the contract without due process of law (Count II).

The record shows the contract requirements specified the bids must be submitted no later than 2:00 p.m., April 10, 1985. Jones and several other bidders submitted their bids by 2:00 p.m., but at 2:03 p.m., after it had been announced that no other bids would be accepted, Interstate Construction Company (Interstate) submitted its bid. Although the City apparently intended to reject Interstate's untimely bid, it was opened with the timely bids. Another bid, submitted between 2:05 p.m. and 2:10 p.m. was rejected because it was submitted after 2:00 p.m.

When the bids were opened, Interstate's bid was about $10,500 under the next lowest bid submitted by Jones, and all bids were over $13,000,000. After Jones protested the

City opening the Interstate bid, it received oral assurance from the city official supervising the bid opening that Interstate's bid would be rejected.

Notwithstanding the untimely bid, Interstate started efforts to secure the contract. At 5:00 p.m. that day, at Interstate's request, the City checked the bid clock and apparently it was three minutes faster than clocks at the U.S. Bureau of Standards and a local time service. The record, however, shows the clock was never found fast in the years before or after 5:00 p.m., April 10, 1985, and no one could say that the clock was three minutes fast at 2:00 p.m. that day. Lawyers representing Interstate contacted the city's chief administrative officer and the mayor.

On April 10, 1985, Jones' attorneys sent a letter to the City protesting consideration of Interstate's bid, demanding the award of the contract to Jones, and advising of Jones' intention to sue if it was not awarded the contract. Similar letters were also sent to the City on April 23 and 25, 1985.

The uncontradicted evidence showed that time is critical right before bids are submitted, and bids are frequently adjusted at the last moment. Potential subcontractors frequently make last minute price changes, and corresponding changes are made in the bids. Consequently, bidders usually synchronize their watches with the City bid clock and maintain contact with their offices from near the bid office so they can receive the latest changes in their bid, but avoid filing a late bid. Indeed, Jones lowered its bid by over $4,000,000 in the last hours and by an additional $200,000 in the minutes before the bid was submitted. Thus, even without knowing the amounts of the other bids, a late bidder gained an important advantage by gaining additional time to revise its bid.

Jones' witnesses testified, without contradiction, that the company is very experienced in constructing large projects. More significantly, the uncontradicted testimony showed

that Jones achieved its anticipated profits on those projects and on 80-90 percent of all its projects. Further, the unrebutted testimony was that cost overruns were the primary reason for not achieving the anticipated profit, that cost overruns were unlikely to occur on projects done regularly, and that the parking decks were a type project done regularly by Jones.

The evidence showed the invitation for bids called for bids on the basic project and two related projects. Jones' witnesses testified the anticipated profits from these two projects were $250,000 and over $264,000. Evidence shows that the bidder awarded the base project was awarded both additional projects.

The unrebutted evidence was that Jones' bid preparation costs were $22,125.05, that because it lost this contract it lost its expected profits on all three projects, and because it lost the projects, it laid off employees it would not have otherwise. Although the trial court ruled the expected profits on the additional projects were too speculative to permit the award of damages for their loss, the court charged the jury that it could measure the damages awarded on Count II by the loss to Jones proved by all the evidence introduced.

The evidence showed that the three letters Jones sent to the City's procurement officials were referred to the City's law department and were never answered. Jones introduced at trial the City's Procurement Code and Real Estate Code (Atlanta Ordinance No. 1983-52, 7/21/83) ("the Code"). Article H of the Code, Appeals and Remedies contains the protest procedures. Jones was authorized to file a protest by letter and the City was required to respond within ten days, with its decision, the reasons therefor, and also informing Jones of its rights to administrative review. Section 5-5111. No such response was ever made.

Instead, the City engaged in extensive internal debate apparently caused by the successful bidder's ability to in-

voke the participation of the City's chief administrative officer and the mayor. Consequently, even though the City's director of the bureau of purchasing and real estate, the assistant director for contracts, and the commissioner of the department of administrative services all deemed that Interstate's bid was untimely and should be rejected and that Jones should be awarded the contract as the lowest responsible and responsive bidder (see Section 5-5044 (9)), the decision on acceptance of Interstate's bid was elevated to the mayor.

The mayor testified that he viewed the matter as a battle between city departments without consequence to the bidders, and he did not feel legal advice was needed. In the mayor's opinion being three minutes late in submitting a bid was not significant. He felt it important to show that the spirit of the law was as important as the letter, and they should not be inflexible if a lower price could be achieved.

Moreover, the mayor's testimony admitted he decided the matter with serious misunderstandings about the facts: He believed that Interstate's bid was $150 000 lower than Jones' bid, not $10,500; that the "fast clock" was detected contemporaneously with the late bid, not three hours later; and that this was only a small project, not one for over $13,000,000. Additionally, the mayor did not know the other late bid was rejected. Further, the mayor testified he "possibly" took into consideration that Jones was a very large contractor with plenty of work and that this "little parking deck . . . probably was not much for them." In spite of the above related facts, the mayor decided to accept Interstate's bid. Jones, however, only learned of this indirectly when it heard Interstate had started work on the project.

Subsequently, suit was filed, the jury verdict was for Jones on both counts, and the trial court entered judgment

in favor of Jones for $1,018,506.19 plus post-judgment interest. Thereafter, the City filed this appeal. *Held*:

1. The City's first enumeration of error alleges the trial court permitted the award double recovery for a single injury. While double recovery is not permitted for one injury, that principle has no application here because there were two injuries (*Davis v. Davidson*, 175 Ga. App. 451, 452 (333 SE2d 64); Count I under state law for not awarding Jones the contract as required (see *Hilton Constr. Co. v. Rockdale County Bd. &c.*, 245 Ga. 533, 538 (266 SE2d 157)), and Count II under 42 USC § 1983 for the denial of due process (see *Board of Regents v. Roth*, 408 U. S. 564, 577 (92 SC 2701, 33 LE2d 548)).

The City also seeks to argue under this enumeration that federal law precludes the damages given under the § 1983 count. As this contention is not included within the enumeration of error and it is not enumerated elsewhere, we may not consider it, OCGA § 5-6-40; *Rider v. State*, 226 Ga. 14 (2) (172 SE2d 318). Further, the scope of appellate review may not be enlarged through a process of switching, shifting and mending one's hold. *Wilson v. State*, 145 Ga. App. 315 (5) (244 SE2d 355).

2. The City's second enumeration of error asserts that the trial court's charge on "the nature of a material deviation" was erroneous. No argument, no reference to the record, or citation of authority was made in the City's brief to support this enumeration, and it is deemed abandoned. Court of Appeals Rule 15 (c) (2); *Sepulvado v. Daniels Lincoln Mercury*, 170 Ga. App. 109 (316 SE2d 554). See also *Cooper v. Commercial Union Ins. Co.*, 192 Ga. App. 815, 816 (386 (SE2d 551).

3. The City's third enumeration contends that the trial court erred by allowing the award of damages for Jones' lost profits. Although lost profits are not recoverable when they are too speculative to permit calculation (*Davis v. Boyd*, 118 Ga. App. 198 (162 SE2d 880)), this rule does

not bar recovery of lost profits when they can be calculated with reasonable certainty. *Moultrie Farm Center v. Sparkman*, 171 Ga. App. 736, 738 (320 SE2d 863); Cobb & Eldridge, Ga. Law of Damages (3d ed.), §§ 2-8; 2A-8.

From the evidence about the nature of this project and Jones' prior experience (especially as viewed and resolved in favor of the verdict, *Union Camp Corp. v. Daley*, 188 Ga. App. 756 (1) (374 SE2d 329)), Jones proved a loss of anticipated profits which could be calculated with reasonable certainty. *Moultrie Farm Center v. Sparkman*, supra. Further, the City's argument that a disappointed bidder for a public contract is never entitled to recover lost profits is contrary to our Supreme Court's decision in *Hilton Constr. Co. v. Rockdale County*, supra. Consequently, the award of damages based on the expected lost profits was authorized.

4. The fourth enumeration contends the trial court erred by directing a verdict for Jones on the City's liability for Count II, the 42 USC § 1983 claim. The City's contention relies on the United States Supreme Court's holding in *Parratt v. Taylor*, 451 U. S. 527 (101 SC 1908, 68 LE2d 420), that an adequate post deprivation remedy can be sufficient due process to defeat a § 1983 claim.

The City contends the failure to adhere strictly to the Code's procedures was not a due process violation, and a post deprivation remedy was sufficient because granting due process would have delayed construction, possibly added to the project's cost, and delayed alleviation of the airport's parking problems. These arguments are not based on the record. The record shows that the contract was not awarded promptly. Although the bidding closed on April 10, 1985, the contract was not awarded until days or weeks after April 29, 1985.

The City's argument that a 42 USC § 1983 action cannot be based on a single act was rejected by our Supreme Court in *City of Cave Spring v. Mason*, 252 Ga. 3-4 (310

SE2d 892). The number of due process violations is not significant if the act was official City policy. The intentional decision by the mayor certainly qualifies.

Additionally, the City's argument ignores that "[t]he fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.' " (*Parratt v. Taylor*, supra at 540), and that post deprivation remedies found to be adequate were required by a need for quick action or the impracticality of providing "meaningful predeprivation process" coupled with the "availability of some meaningful means" of assessing the action after the fact. Id. The facts of this case belie any argument either that prompt award was required or that a hearing was impractical. Thus, a post deprivation hearing was not sufficient. *Logan v. Zimmerman Brush Co.*, 455 U. S. 422, 436 (102 SC 1148, 71 LE2d 265). The City's argument also ignores the requirement that a constitutional post deprivation procedure must provide an *adequate* remedy to redress the wrong. See generally *Vann v. DeKalb County Bd. of Tax Assessors*, 186 Ga. App. 208, 211 (1) (367 SE2d 43), citing *Parratt*, supra, and *Hudson v. Palmer*, 468 U. S. 517, 533 (104 SC 3194, 72 LE2d 393). The City offers as a post deprivation remedy Jones' right to sue for damages. As this case shows, however, that right does not entirely compensate for the loss and may only come many years after the fact. Accordingly, that remedy is not adequate.

Finally, the City's argument that Jones had no protected property right under the law of this state, completely misreads our Supreme Court's decision in *Hilton Constr. Co.*, supra. See also *Strickland v. Ports Petroleum Co.*, 256 Ga. 669, 670 (353 SE2d 17), the right to contract is a protected property right. Contrary to the City's assertions, *Hilton Constr. Co.* was remanded to the trial court for determination whether damages were appropriate. 245 Ga. at 540. See also *Mark Smith Constr. Co. v. Fulton County*, 248

Ga. 694, 695 (285 SE2d 692). Further, the Supreme Court's decision in *Hilton Constr. Co.* specifically held that *Peeples v. Byrd*, 98 Ga. 688 (25 SE 677), on which the City bases this argument, would no longer be followed "when as in this case the law required the award of the contract." 245 Ga. at 538. Since only Jones was the lowest responsive and responsible bidder (see Division 5, infra), the City's argument ignores the plain mandate of the Code.

"A directed verdict . . . is not proper unless there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, demands a certain verdict." (Emphasis deleted.) *Union Camp Corp. v. Daley*, supra at 756; OCGA § 9-11-50 (a).

Here the evidence established that the City deprived Jones of the contract without due process, including the procedure required by the Code. This is sufficient to establish a violation of 42 USC § 1983. In this regard, we must note that the City did not try to prove that it afforded Jones any due process of law. Accordingly, the trial court did not err by granting a directed verdict to Jones on this claim.

5. The fifth enumeration of error contends the trial court erred by refusing to find as a matter of law the City could accept a late bid as long as other bids were not opened. This contention asked the trial court to grant a right the City did not give itself in the Code.

The Code specified that "[t]he contract *shall* be awarded with reasonable promptness by written notice to the lowest responsible and *responsive* bidder *whose bid meets the requirements and criteria set forth in the invitation for bid.*" (Emphasis supplied.) Procurement Code § 5-5044 (9). The Procurement Code defines "shall" as "denoting the imperative" (§ 5-5002 (17)) and a "responsive bidder" as "any person who has submitted a *bid . . which conforms in all material respects to the invitation for bids. . . .*" (Emphasis

supplied.) Procurement Code §5-5002 (19). The contract specifications and the invitation for bids for this contract required bids to be submitted before 2:00 p.m., April 10, 1985. Interstate did not submit its bid by this time. (Since this argument concedes that Interstate's bid was late, we need not consider the "fast clock claim.") Therefore, since Interstate did not submit a bid which conformed "in all material respects to the invitation for bids" it was not a responsive bidder, and the City was required to award the contract to Jones (*Hilton Constr. Co.*, supra). Moreover, whether the lateness of Interstate's bid was a mere informality which could be waived, or a material defect which could not be waived was submitted to the jury by special interrogatory and the jury decided that the defect was material. Accordingly, the City did not have the discretion to accept the late bid, and the trial court did not err. See also *Glynn County v. Teal*, 256 Ga. 174 (345 SE2d 347).

Further, the City cited no authority in the Code granting it the discretion to accept a late bid with a material defect. Moreover, the City's arguments based on authority from foreign jurisdictions are contradicted by controlling precedent from our Supreme Court. Both *Hilton Constr. Co.*, supra, and *Georgia Branch, Assoc. &c. v. City of Atlanta*, 253 Ga. 397 (321 SE2d 325) clearly hold that when the Code and City Charter require an act, the City lacks the discretion to disregard the requirements.

6. The City's final enumeration contends the trial court erred by holding that Jones substantially complied with OCGA § 36-33-5. Although it is doubtful that such notice was required on the state law count (see *Schaefer v. Mayor &c. of Athens*, 120 Ga. App. 30 (170 SE2d 339)), the trial court correctly ruled that the three letters Jones sent the City complied substantially with OCGA § 36-33-5. *City of Atlanta v. Frank*, 120 Ga. App. 273 (170 SE2d 265); *City of Atlanta v. Fuller*, 118 Ga. App. 563 (164 SE2d 364). These letters satisfied the purposes of this section (*City of Gainesville v. Moss*, 108 Ga. App. 713 (134 SE2d 547))

and the complaint adequately averred compliance of § 36-33-5. Moreover, this requirement does not apply to the 42 USC § 1983 count. *Majette v. O'Connor*, 811 F2d 1416, 1418 (11th Cir. 1987).

Judgment affirmed. Deen, P. J., and Cooper, J., concur.

IN THE SUPREME COURT

STATE OF GEORGIA

CITY OF ATLANTA,

Appellant,

vs.

J. A. JONES CONSTRUCTION CO.
and E.R. MITCHELL CONSTRUCTION CO.,
d/b/a JONES/MITCHELL, JOINT VENTURE,

Appellees.

CASE NO. S90C0957

APPELLEE'S MOTION FOR REHEARING AND RECONSIDERATION

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The Court's recent decision in this case is an open invitation to official error and even corruption. By limiting the amount of damages due a public bidder which is illegally deprived of not only a contract award but also a forum for effective protest, this Court invites public bodies both to ignore bid requirements and to do so behind closed doors.

This motion for rehearing points out both practical problems and legal errors in Division 2 of the opinion, concerning Appellee's 42 U.S.C. § 1983 claim.

This Court's holding that a municipality should pay only minimal damages[1] for failing to to provide a constitutionally required hearing leaves public contractors and the public with no effective remedy against illegal denial of the lowest qualifying bid. Mandamus relief is unavailable, as a matter of law. *Hilton Constr. Co. v. Rockdale Cty. Board of Ed.*, 245 Ga. 533, 540 (1980). Equitable relief against municipalities will be denied almost invariably because of the time sensitive nature of construction projects. See, *e.g.*, *Mark Smith Constr. Co. v. Fulton Cty.*, 248 Ga. 694, 695 (1982) ("In view of the availability of an adequate remedy at law (money damages) and the hardship which a delay in construction . . . would impose on the general public, we cannot say that the trial court abused its discretion in this case.")

This Court now has rejected the remedial possibility of significant state law damages against a municipality to deter illegal conduct in public contract award matters.[2]

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[1] The limitation which the Court imposes upon damages makes it likely, as a practical matter, that no illegally deprived bidder will pursue a damage claim, because the cost of doing so will far exceed the potential recovery.

[2] In this motion, Appellee does not argue that the Court erred by limiting damages recoverable on its state law claims, recognizing that a majority of this Court have decided that state law damages include only bid preparation costs. Rejection of more extensive monetary relief

This Court has suggested the possibility of suits against public officials in their personal capacity for the additional monetary damages which Appellee seeks, but the Court will recognize that this remedy too is largely illusory in practice. As a matter of law, no remedy is available against an official unless the wronged citizen can show not only deprivation of right, but also fraud and corruption.

Practical obstacles also stand in the way of meaningful redress. Because of the political nature of public contracting, few contractors can afford to antagonize public officers by suing them individually. Even in cases where a contractor can afford suit as a political matter, public offenders are ordinarily judgment proof against any substantial damage claim. See *Owen v. Independence*, 445 U.S. 622, 652 n.36 (1980).

There is only one remedy by which the contract process can be sorted out, and contract bidders be made whole, without substantial injury to the public. That remedy is to require the governing authority itself to give procedurally open and adequate consideration to competing bids, or suffer the full consequences in damages if it fails to do so. This approach maximizes the possibility of avoiding erroneous decision, by requiring lawful consideration *before* the fact; by making substantial compensatory damages turn upon failure to provide such a process; and by making the damages for failure to provide such consideration sufficient to assure that the municipality gets its own house in order.

The result of the Court's opinion is to cast aside even this possibility of redress. The Court holds that Appellee is entitled to no different damages for denial of procedural due process from those damages due it under state law for illegal denial of its bid. This destruction of the last effective remedy to force adherence to public bidding requirements justifies this Court's rehearing.

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is highly relevant, however, to the issue of what other remedies should be available, as the special concurrence in this case recognizes.

As a legal matter, Appellee shows that this Court's decision on federal constitutional damages is erroneous in three respects. First, Appellant ("the City") failed to preserve on appeal any arguments against the measure of constitutional damages used by the trial court and jury, so that the verdict on Count II should stand. Second, the Court improperly ruled that federal constitutional damages are necessarily identical to state law damages arising from the same transaction. Finally, the Court erred in measuring federal constitutional damages.

I. THE CITY WAIVED ANY ARGUMENT AGAINST THE MEASURE OF FEDERAL CONSTITUTIONAL DAMAGES.

The opinion of the Court of Appeals makes abundantly clear that the City did not preserve any argument over the measure of damages for Appellee's due process claim. As that Court noted,

> The City's first enumeration of error alleges the trial court permitted the award [of a] double recovery for a single injury. While double recovery is not permitted for one injury, that principle has no application here because there were two injuries: Count I under state law for not awarding Jones the contract as required, and Count II under 42 U.S.C. § 1983 for the denial of due process.
>
> The City also seeks to argue under this enumeration that federal law precludes the damages given under the § 1983 count. As this contention is not included within the enumeration of error and it is not enumerated elsewhere, we may not consider it. Further, the scope of appellate review may not be enlarged through a process of switching, shifting and mending one's hold.

Atlanta v. J.A. Jones Constr. Co., 195 Ga.App. 72, at 75 (1990) (citations omitted).

The City waived objection to the *measure* of constitutional damages as early as trial. During colloquy with counsel following a jury request for reinstruction, the trial court reiterated that lost profits were and are a suitable damage measure for violation of due process rights. (R.371) The City nowhere disputed that proposition in its objections. (R.360-61, 371-72) Thus the only issue which the City reserved, with regard to federal constitutional damages, was their alleged duplication of the jury's state law damages award.

Duplication of damages means receiving the same damages twice over, on different counts, for a single loss. *Wright v. Lail*, 219 Ga. 607 (1964); see also *Clappier v. Flynn*, 605 F.2d 519, 530 (10th Cir. 1979). The issue whether awards on separate counts are *duplicative* is clearly different from the issue whether damages are properly *measured* on a given count. For that reason, objection on the one ground is insufficient to preserve the other on appeal. *Corriz v. Naranjo*, 667 F.2d 892, 895-96 (10th Cir. 1981), *cert. dismissed*, 458 U.S. 1123 (1982).

In short, by objecting to alleged duplication, the city did not preserve any defense that federal constitutional damages exclude lost profits. Assuming *arguendo* that the City could revive on certiorari a claim not preserved in either the trial court or the Court of Appeals, by asserting it in this Court for the first time, the City has not taken the necessary steps in this Court either. The City's relevant "Assignment of Error" in its Application for a Writ of Certiorari reads as follows:

> b) The City assigns error upon the judgment of the Court of Appeals in holding that it was proper for the trial court to permit, and for the trial court's instructions to have caused, the Appellee to be able to recover twice for the same injury.

Application at 8.

The City cannot be heard now to attempt to expand the issues to include the appropriate *measure* of constitutional damages, having limited its objection to constitutional damages at every stage to the issue of duplication. To the extent *any* issue of duplication of damages was posed by the verdict,[3] that issue has disappeared by virtue of this Court's ruling on state law damages. Now that the Court has limited state law damages to recovery of bid preparation costs, the jury award of constitutional damages does not and cannot be construed to duplicate the state law damage award as limited by this Court.

II. THIS COURT RULED IMPROPERLY THAT THE MEASURE OF FEDERAL CONSTITUTIONAL DAMAGES IS IDENTICAL TO STATE DAMAGES

Assuming *arguendo* that the City has preserved sufficiently for this Court's review an argument over the measure of section 1983 damages, Appellee shows in this and the following section that this Court erred on the merits by equating the federal law constitutional damages to the damages this Court has decided can be recovered under state law. Because the injuries compensated by Count I and Count II differ, there was no duplication of damages.

In Division 2 of its opinion, this Court erroneously equates the measure of state law damages with that recoverable under the federal law of constitutional damages. The Court explicitly refers back to its discussion of state law damages in deciding the federal measure as well: "As we have held above, the permissible recovery for that wrong is the reasonable expense of bid preparation." Opinion at 3.

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[3] In fact, the jury's verdict on Count II was limited because of the trial court's cautious instructions *not* to duplicate damages. The jury would likely have awarded Appellee its lost profits on Count II, in addition to other damages, had it not already awarded those damages on Count I. (T.369) This Court should consider remanding this litigation for reconsideration of damages awarded under Count II.

The Court's equation of state and federal law remedies is erroneous as a matter of law. The measure of damages awardable for federal injury is categorically not the same as that under state law for injuries arising from the same transaction.

> The [United States] Supreme Court has stated that § 1983 remedies are "supplementary to any remedy any State might have," and "have no precise counterpart in State law." The Court added that "it is 'the purest coincidence' . . . when state statutes or the common law provide for equivalent remedies." Thus, there is no requirement that a state remedy be employed to compensate for a violation of a federal interest. In fact, the Court has noted that under § 1988, "resort to State law . . . should not be undertaken before principles of federal law are exhausted."

Gilmere v. Atlanta, 865 F.2d 734, 739 (11th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 70 (1990).

The case at bar illustrates the necessary difference between state and federal measures of injury. Causes of action for denial of a hearing are unknown at common law. Because the injury is one unfamiliar to state law, the damages for deprivation of procedural due process necessarily are unique as well. "[T]he interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts." *Carey v. Piphus*, 435 U.S. 247 (1978) (procedural due process case).

Thus, this Court's automatic adoption of state law damages as federal constitutional damages is erroneous. Because the injuries compensated differ, there was no duplication.

III. THIS COURT ERRED BY DENYING FULL COMPENSATION AS THE REQUIRED MEASURE OF FEDERAL CONSTITUTIONAL DAMAGES.

This court erred as well as in defining the measure of federal constitutional damages. The leading opinion of the Supreme Court of the United States defines that measure in terms of full compensation for the injury suffered by the plaintiff:

> [D]amages in tort cases are designed to provide "*compensation* for the injury caused to plaintiff by defendant's breach of duty." To that end, compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as "impairment of reputation . . ., personal humiliation, and mental anguish and suffering." Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are *compensatory*—damages grounded in determinations of plaintiffs' actual losses. Congress adopted this common-law system of recovery when it established liability for "constitutional torts." Consequently, "the basic purpose" of § 1983 damages is "to *compensate persons for injuries* that are caused by the deprivation of constitutional rights."

Memphis Comm. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986) (all emphases in original) (citations omitted).

The *Stachura* Court went out of its way by its emphases to stress that the central and overriding purpose of constitutional damages is to *compensate* the victim. Full compensation for all losses is recoverable under federal law. "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Owen v. Independence*, 445 U.S. 622, 651 (1980). "[W]ithout a meaningful remedy, aggrieved individuals will have little incentive to seek vin-

dication of those constitutional deprivations. . . ." *Id.* at 651 n.35.[4]

Compensation, for ordinary purposes and specifically for the purposes of constitutional damages, is not limited to "out-of-pocket loss," such as the bid preparation costs to which this Court limited relief. Compensation also includes, and explicitly so, "other monetary harms." *Stachura*, 477 U.S. at 307.

Such "other monetary harms" include profits and other amounts[5] lost as a result of denial of constitutional rights. A perfect example is *Flores v. Pierce*, 617 F.2d 1386 (9th Cir. 1980), *cert. denied*, 449 U.S. 875 (1981). The plaintiffs were deprived of a license to sell wine and beer through the unconstitutional conduct of city officials. The defendants objected to the damages award. Quoting from *Carey v. Piphus*, the court found lost profits a permissible element of constitutional damages. *Id.* at 1392.

A similar example of a section 1983 award for lost opportunity to generate revenue is *Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547 (7th Cir. 1986), *aff'd*, 479 U.S. 1048 (1987). Where the defendant municipality unconstitutionally denied the plaintiff the right to canvas publicly for funds, the federal court of appeals (and the United States Supreme Court in affirming) did not limit the plaintiff to recovery of expenditures incurred in preparation for its canvassing drives. Rather, the plaintiff was entitled to recover the amounts it would have earned from the drives which the city prevented. 796 F.2d at 1558. Notably, that measure of recovery was permitted even

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[4] Of course, municipalities are not subject to awards of punitive damages under section 1983. *Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981). Appellee neither sought nor was awarded punitive damages under either state or federal law.

[5] See the jury's award of $375,000 on Count II in addition to lost profits on Count I.

though it effectively "compensat[ed] the plaintiffs for effort they did not make and risks they did not take." Opinion of this Court, at 2-3.[6]

The *Flores* and *Watseka* measure of federal constitutional damages is consistent with general notions of compensable loss. As *Stachura* so carefully points out, compensation is not limited to out-of-pocket loss. "Other monetary harms" include the loss of rightful opportunity. In general, damages may compensate "diversion of benefits from a person who, without the diversion, would have a reasonable expectation of receiving them." D.Dobbs, *Remedies*, § 6.1 at 431 (1973). Lost but deserved profits are a classic instance of lost opportunities, long recognized as compensable as a matter of federal right. See, *e.g.*, patent infringement, 35 U.S.C. § 284, *Marvel Specialty Co. v. Bell Hosiery Mills, Inc.*, 386 F.2d 287 (4th Cir. 1967), *cert. denied*, 390 U.S. 1030 (1968); copyright infringement, 17 U.S.C. § 101 (b), *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 433 F.2d 409 (2d Cir. 1970), *cert denied*, 401 U.S. 977 (1971); trademark infringement, 15 U.S.C. § 1117, *Deering Milliken & Co. v. Gilbert*, 269 F.2d 191 (1959); and antitrust violations, 15 U.S.C. § 15, *Eastman Kodak Co. v. Southern Photo Materials*, 273 U.S. 359 (1927). As a general matter, where a plaintiff is prevented from working and earning profits by the illegal conduct of the defendant, federal law does not chastize the plaintiff

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[6] Full and complete back pay is also a presumptive remedy in cases demonstrating unconstitutional denial of job opportunity (despite trial courts' retention of some discretion, in that back pay is an equitable remedy rather than damages). *Gurmankin v. Costanzo*, 626 F.2d 1115, 1120-21 (3d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981); *Harkless v. Sweeny Independent Sch. Dist.*, 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971). The mere availability of back pay relief, let alone the presumption favoring it, is inconsistent with the rationale used by this Court. By definition, back pay is an award for an illegally denied opportunity to perform—precisely the kind of relief Appellee was awarded below.

for failing to perform, but rather recognizes that an award of lost profits compensates for the defendant's wrong in preventing that very performance. See, *e.g., Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 860-65 (5th Cir. 1981), *cert. denied*, 454 U.S. 1125 (1982) (antitrust violation caused compensable loss of plaintiff's entire future business profits).

Appellee's loss of profits and other amounts is traceable directly to the City's denial of a hearing on its bid, in the sense required by the decisions of the United States Supreme Court. This Court has ruled unequivocally that Appellee was entitled to be awarded the airport parking deck contract. "[H]ere, a governmental entity has frustrated the bid process and awarded the contract to an unqualified bidder." Opinion at 2. A constitutionally required hearing would have established Appellee as both the lowest qualifying bidder and the contractor entitled to the award. Denial of a hearing therefore resulted in lost profits and other monetary losses, as the jury in this case recognized. That is the measure of Appellee's compensable loss.

> Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who harbor doubts about the lawfulness of their intended conduct to err on the side of protecting citizens' rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringement on constitutional rights.

Owen v. Independence, 445 U.S. at 651-52; see also *Stachura*, 477 U.S. at 307. Therefore, for purposes of federal constitutional damages, the financial punch packed by fully compensatory damages against a municipality is a positive advantage, rather than the disadvantage the Court perceives in such a remedy for state law purposes.[7] For that reason, neither fiscal nor any other concerns grant municipalities immunity against compensatory damages for constitutional violations. *Owen*, 445 U.S. at 654-56. An award of anything less than full compensation does not pack the deterrent punch which *Owen* and *Stachura* envision.[8]

A full and open hearing is the last line of defense against illegal official conduct. Precisely because this Court has chosen to reject effective state law remedies which might deter official illegal acts, relief which forces the municipality to order its own house becomes all the more important. Precisely because the governing authority's exposure is limited as a matter of state law damages, it should be forced to adhere to basic due process require-

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[7] This Court's ruling on state law damages in effect holds that the interest of an illegally deprived bidder in full compensation is outweighed for state law damage purposes by the separate concern for the sheer size of damage awards against municipalities. The Court labels an award of lost profits an "unwarranted waste of taxpayers' money." Opinion at 3. This Court is of course the final arbiter of state law damages, and has declared itself on that point. But the law of federal constitutional damages does not take into account such considerations. *Carey*, *Owen* and *Stachura* together establish the federal measure of damages as full compensation regardless of cost concerns.

[8] The laudable result that fully compensatory damages also maximize deterrence does not convert compensatory damages into punitive damages. For federal damage purposes, deterrence and punishment are identifiably separate goals. *Newport v. Facts Concerts, Inc.*, *supra*, 453 U.S. at 267-68. Even as the *Newport* Court immunized municipalities from punitive damages, it reaffirmed the deterrent power of compensatory damages. *Id.* at 268-69.

ments in reaching its decisions, or to pay the full consequences if it does not do so.

Thus both the constitutional violation and the constitutional remedy are different from the state law aspects of this case. The purpose of due process is to force officials to consider claims of entitlement openly and thoroughly, so that they may rectify, and will be forced to rectify, their own mistakes. Failure to hold a hearing is a separate injury, not only to the aggrieved party, but also to the public which has a stake in correct decision making. See *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970).

The measure of damages required by good public policy, and by decisions of the United States Supreme Court, is full compensation for failure to adhere to the commands of due process. Full compensation includes the profits and other monetary damages lost by Appellee when the City denied it any hearing, and thereby its rightful opportunity to construct the airport parking deck.

IV. CONCLUSION

At a minimum, the jury's due process verdict should stand, because the City did not preserve for appeal the issue of the measure of constitutional damages. If the Court nonetheless reaches the issue of federal constitutional damages, it should decide that their measure is full compensation, and not the damages which the Court has held are appropriate for violation of state law. An appropriate disposition of this action is remand for reconsideration of the rightful damages to which Appellee may be entitled under Court II, including those lost profits artificially awarded on Count I rather than on Count II.

This 17th day of December, 1990.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing APPELLEE'S MOTION FOR REHEARING AND RECONSIDERATION, upon counsel by depositing same in the United States mail, first class postage prepaid and addressed as follows:

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This 17th day of December, 1990.

/s/ David A. Webster
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SUPREME COURT OF GEORGIA

ATLANTA

Case No. S90G0957

CITY OF ATLANTA

V.

J. A. JONES CONSTRUCTION COMPANY *ET AL.*

DECEMBER 19, 1990

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Smith, P.J., who dissents.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

Supreme Court, U.S.
FILED
APR 19 1991
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(2)

No. 90-1462

In The

Supreme Court of the United States

October Term, 1990

J. A. JONES CONSTRUCTION CO. and E. R. MITCHELL CONSTRUCTION CO., d/b/a JONES/MITCHELL, a JOINT VENTURE,

Petitioner,

vs.

CITY OF ATLANTA, GEORGIA,

Respondent.

Petition For Writ Of Certiorari To The Georgia Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Georgia Supreme Court correctly ruled that damages awarded under 42 U.S.C. § 1983 duplicated the damages which were recovered by petitioner under state law and thus constituted a "double recovery" for a single injury.

PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF GEORGIA

All of the parties to the proceeding in the Supreme Court of Georgia are correctly listed in the caption of the case in this Court.

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vs.

CITY OF ATLANTA, GEORGIA,

Respondent.

Petition For Writ Of Certiorari To The Georgia Supreme Court

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Georgia Court of Appeals is set forth in *City of Atlanta v. J. A. Jones Construction Co.*, 195 Ga. App. 72, 392 S.E.2d 564 (1990). The opinion and decision of the Supreme Court of Georgia set forth at *City of Atlanta vs. J. A. Jones Construction Co.*, 260 Ga. 658, ___ S.E.2d ___ (1990).

Copies of these decisions correctly appear in the appendix to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The opinion of the Supreme Court of Georgia was rendered on December 5, 1990. That Court denied rehearing on December 19, 1990. The Petition for a Writ of Certiorari was filed with this Court on March 19, 1991. This Court has certiorari jurisdiction, if it chooses to exercise such jurisdiction, under 28 U.S.C. § 1257(3) in that this controversy involves the interpretation and application of a statute of the United States.

FEDERAL STATUTE INVOKED

Every person who under color of any statute, ordinance, regulation, custom or usage of any state . . . subjects or causes to be subjected any citizen of the United States to the deprivation of any rights, privileges or immunities secured by the constitution and laws shall be liable to the party injured in an action at law. . . . 42 U.S.C. § 1983.

STATEMENT OF THE CASE

In the early part of 1985, the City of Atlanta, Georgia, respondent herein (hereinafter the "City") determined that it needed to expand its parking facilities at its airport, and in furtherance of that effort, the City's Director of the Bureau of Purchasing and Real Estate issued an invitation to bid on a contract for the construction of two parking decks at the airport. The invitation to bid stated that the bids were to be submitted by 2:00 P.M. eastern

standard time on April 10, 1985. J. A. Jones Construction Co. and E. R. Mitchell Construction Co., d/b/a Jones/ Mitchell, a Joint Venture, the petitioner herein (hereinafter "Jones" or "petitioner"), submitted a bid on this contract. Several other construction companies, including Interstate Construction Company ("Interstate") also submitted bids. The Interstate bid was the lowest bid received. Jones' bid was the second lowest.

The City's Bureau of Purchasing and Real Estate uses an electric wall clock attached to a printing mechanism to record the time at which bids are submitted. Jones' bid was recorded by the city clock as being received at 1:59 P.M. on April 10, 1985. The Interstate bid was recorded by the city clock as being submitted at 2:03 P.M. on April 10, 1985.

Having submitted a bid marked untimely by the City, Interstate began efforts to secure the contract. At 5:00 P.M. on the same day, at Interstate's request, the City checked its bid clock and it was three minutes faster than the clocks at the U. S. Bureau of Standards as well as a local time service. By those clocks, the Interstate bid would have been timely. Letters and telephone calls from attorneys for both Interstate and Jones ensued.

The bid was awarded to Interstate, the low bidder. Jones filed its Complaint against the City and three of its officials on July 19, 1986 seeking damages in the form of profits which it would have made but claimed it lost because of the failure of the City to award it the contract. The complaint contained two alternative counts: a claim brought pursuant to state law and a count brought pursuant to 42 U.S.C. § 1983. The Georgia Supreme Court

held that the damages recoverable under each of these counts were identical and held that the damages awarded by the jury under the state law count fully compensated the plaintiff, so that the damages awarded under the federal count were unnecessary:

> "The basis for appellees' § 1983 claim was that appellant failed to afford them a hearing at which they could contest the award of the contract to another bidder. The damage from that failure was that appellees were not themselves awarded the contract. As we have held above the permissible recovery for that wrong is the reasonable expense of bid preparation. Accordingly, we hold that the award for damages on the § 1983 claim must also be reversed." 260 Ga. at 659.

At page four of its brief, petitioner Jones claims that the trial court "avoided duplication" of damages by "charging explicitly that the jury must not award the same damages on both counts". This statement is erroneous.

In its initial charge, the trial court made no effort whatsoever to make *any* distinction between Count One and Count Two concerning the damages to be awarded. (T-357-359). Instead, the trial court specifically instructed the jury to consider *the same* elements in both counts (T-357-359). Note the charge of the court at page 357 of the transcript of this trial:

> "Members of the jury, I charge you that as a matter of law the plaintiff is not entitled to recover as damages its fees for the alternate bids, that is, the fee in the amount of $250,000 identified as Alternate No. 1 in the documentary evidence and the fee in the amount of $264,365

> identified as Alternate No. 2 in the documentary evidence.
>
> You may, however, award the plaintiff its fee on the base bid if you deem that appropriate under the facts as you find them from the evidence in the law as I instruct you. *And you may apply this charge that I have given you to both counts* of the indictment." (sic) (T-357) (Emphasis supplied)

Then compounding its error, the trial court restated its erroneous charge in different words:

> "I charge you further members of the jury that you may award plaintiff its lost profits if you find that the calculation of lost profits is reasonably ascertainable. *You may consider this charge in regard to both counts.*" (T-357-358) (Emphasis supplied)

In light of the foregoing quote, it is impossible to conclude that the court "charged explicitly" that the jury "must not award the same damages on both counts". (Petition, page four)

These charges were clearly erroneous and clearly confused the jury. Indeed, the jury displayed its confusion by sending a note to the judge (T-369) asking the following question:

> "If a money award is granted, what determines whether it goes to Count One or Count Two?" (T-369)

It was only after the jury showed that it was confused, and after the City had noted its objections for the record, that the court attempted after the fact to partially unscramble the egg, thus falling into another error by attempting to instruct the jury to award damages to the plaintiff's federal claim based on the abstract value of the

right being claimed. (T-372-374) This instruction violated this Court's holding in *Memphis Community School District v. Stachura*, 477 U.S. 299 (1966).

Jones seeks to glean separate support for the award under its federal claim by referring to "lost profits from so-called 'add-ons' (additional work undertaken in the normal course by the awardee of the original contract)". (Petition, pages 4-5). These add-ons do not provide record evidence to support the duplicative damages awarded on Jones' federal claim, *because the trial court directed a verdict* as to such "add-on fees" in favor of the City and specifically instructed the jury not to award them. (T-357).

Jones urges record support for the federal damage claim in a series of "layoffs" of its employees. But petitioner cites no evidence and cannot cite any evidence as to how many layoffs occurred, when they happened, when the employees were rehired, or any other concrete or tangible way in which the petitioner was damaged in a legal sense by these layoffs. (Petitioner is, after all, a corporate entity separate and apart from its employees and required to prove its own damages in court). Petitioner only suggests in a vague way that it was "less prepared to bid for work on subsequent contracts". This is much too speculative for the Court to consider as a basis for awarding damages.

SUMMARY OF ARGUMENT

The underlying property interest protected by petitioner's due process claim is identical to the property

interest protected by state law and the damages awarded under both the federal claim and the state law claim were correctly held by the Georgia Supreme Court to be duplicative so that full recovery under petitioner's state law count precluded an award of the same damages under petitioner's federal count.

ARGUMENT AND CITATION OF AUTHORITIES

Petitioner argues that the measure of damages ruling by the Georgia Supreme Court conflicts with federal law, but does not point out how such a conflict exists. In this regard, petitioner's argument assumes there is a difference between the federal rule and the state rule regarding the measure of damages in a case such as this. But the state law count was the one where bid preparation costs, contract fees and lost profits were recovered in the first instance. The trial court instructed the jury to bring in a separate award for violation of the federal constitutional right based on the jury's "enlightened conscience" considering "all of the evidence in the case." (T-372-373)

It is important to remember that Jones' constitutional claim is one of procedural due process: the constitutional right asserted is not an insurmountable bar to the deprivation of life, liberty or property; it is only a procedural right that one may not be deprived of life, liberty or, in this instance, property without "due process of law". Therefore, the Court must look to the underlying property interest protected by the constitutional right being asserted; as stated by this Court in *Carey v. Piphus*, 457 U.S. 247, 98 S.Ct. 1042 (1978):

> "In order to further the purpose of §1983 the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interest protected by the particular right in question – just as the common law rules of damages themselves were defined by the interests protected in the various branches of the tort law."

The petitioner seeks to avoid the difficulty with the holding of the Court of Appeals, and the reason for the reversal thereof by the Georgia Supreme Court, which is defining the damages (other than the lost fees and the bid preparation costs which had been awarded under Count One) which the petitioner suffered to justify a separate award under Count Two. There are none.

The petitioner has attempted to draw a distinction between the failure of the City to award the contract to it, and the City's failure to convene a hearing (i.e., its due process claim) in which petitioner could protest the failure to award the contract to it. Of course, the only possible purpose of such a hearing would have been for the petitioner to have tried to persuade the city officials to award it the contract.

In other words, the underlying property interest under both the state and federal law counts in this case is the same one: the failure of the petitioner to obtain a contract which it desired.

Thus, petitioner's argument that two separate injuries are at work here ultimately lead down one single path of error. No matter which event petitioner complains of, the end result, i.e., the injury to petitioner, was only one: it bid on a contract which it did not get. The Georgia

Supreme Court correctly held that the award of damages under both counts would have been a "double recovery" for a single injury. Put another way, if it had been awarded the contract what would the damages have been to the petitioner caused by a failure to have had a hearing?

Alternatively, the Georgia Supreme Court avoided the permitting of a recovery of $375,000 for the abstract value of the constitutional right denied by the failure to convene a hearing, recognizing that this kind of recovery has been expressly forbidden by this very Court under its holding in *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S.Ct. 2537 (1986).

The Court of Appeals of Georgia simply declared that there were two injuries in this case without specifying what they were and how they differed. The Supreme Court of Georgia corrected this error, recognizing, as this court did in *Carey v. Piphus*, 437 U.S. 247, 98 S.Ct. 1042 (1978) that "rights, constitutional and otherwise, do not exist in a vacuum" and that "their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect". The Georgia Supreme Court also recognized the holding in *Carey v. Piphus* that "the cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty". Here, the petitioner has been fully compensated under Georgia law for the injury caused by the alleged breach of duty. It need recover no more under its federal law count and this court does not need to grant certiorari for that reason.

As noted in *Carey v. Piphus*, 437 U.S. 247, 98 S.Ct. 1042 (1978) "the members of Congress that enacted Section 1983 did not directly address the question of damages . . . " and there is "no evidence . . . that Congress intended any enforcement mechanism more formidable . . . than compensatory damages". *Carey v. Piphus*, 437 U.S. 252, 98 S.Ct. 1048 (1978).

As noted in *Carey v. Piphus*, "in some cases the interests by a particular branch of the (common law of torts) may parallel closely the interests protected by a particular constitutional right", and "in such cases it may be appropriate to apply the tort rules of damages directly to the section 1983 action."

Here, as discussed above, the interest protected by the state law is *identical* to the interest protected by the due process constitutional right asserted by Jones – it bid on a contract which it did not get.

Where interests protected by a particular constitutional right are protected by a parallel state law, the appropriate measure of damages may well be, and in this case was, the amount of damages awarded under the state law theory of recovery.

"The rules governing compensation for injuries . . . should be tailored to the interests protected by the particular right in question . . . " *Carey v. Piphus*, 435 U.S. 247, 253, 98 S.Ct. 1042, 1050 (1978).

In *Garcia v. Wilson*, 731 F.2d 640 (1984), it was held that the language in 42 U.S.C. §1988 requires a "three step process": first, the court should look to the laws of the United States so far as suitable to carry the (civil rights

statutes) into effect; next, if no suitable federal rule exists, courts undertake the second step and apply "state common law as modified and changed by the constitution and statutes" of the forum state; and finally, the state law is to be applied if it is not "inconsistent with the constitution and laws of the United States". *Garcia v. Wilson*, 731 F.2d 640, 646 (1984).

Undertaking this three step process, one finds first that there are no cases setting forth a federal standard for calculating damages in a case such as this, where a "disappointed bidder" who has not been awarded a contract and claims damages therefor, has sued the public entity letting the contract. Since no federal rule exists, the court should look to the state law and the law in Georgia has been set forth in this very case: the disappointed bidder is entitled to recover the reasonable costs of preparing its bid, but not entitled to recover lost profits. Applying the third step, there is no reason to conclude that this state law found to exist in Georgia is "inconsistent with the constitution and laws of the United States". Therefore, the Georgia Supreme Court correctly applied the state law in this case and held the federal damages would have been duplicative.

This is consistent with the numerous holdings that "when state law claims have been joined with federal civil rights actions", the Supreme Court "had traditionally looked to principles of common law in fashioning suitable remedies". *Carey v. Piphus*, 435 U.S. at 258, 98 S.Ct. 1049 (1978). See, also *Clappier v. Flynn*, 605 F.2d 519 (10th Cir. 1979) where it was held:

> "As such, the two claims for relief pled in this case are simply alternative bases for seeking the

> same relief, in much the same way as negligence, breach of express and implied warranties, and strict liability are alternative theories for according a damaged plaintiff in a products liability action identical relief. It is clear . . . that a plaintiff is not entitled to a separate compensatory damage award under each legal theory. Rather, he is entitled to only one compensatory damage award should liability be found on any one of the three or more than the three theories involved." *Clappier v. Flynn*, 605 F.2d 519, 529 (1979)

Except in cases where punitive damages may be allowed (which is not the case here), an injured party may recover damages only for the *actual loss* he suffered and no more. He is to be made whole, but not entitled to be put in a better condition than he would be in had the wrong not been committed. *Missouri Pacific Railroad Co. v. H. Rouw Company*, 258 F.2d 445 (5th Cir. 1950) *cert. denied*, 358 U.S. 929, 79 S.Ct. 315; *Clappier v. Flynn*, 605 F.2d 519, 529 (10th Cir. 1979).

CONCLUSION

For the foregoing reasons, and under the authorities cited above, the ruling of the Supreme Court of Georgia was correct and this Court should deny petitioner's request for a writ of certiorari.

This 19th day of April, 1991.

Respectfully submitted,

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